

**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

**PLAINTIFFS' REPLY TO DEFENDANT'S BRIEF
No. 33205**

ADDA MOTTO, et al.,

Plaintiffs,

vs.

**THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL
PROTECTION, OFFICE OF ABANDONED MINE LANDS AND RECLAMATION, et al.**

Defendants.

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NATURE OF PROCEEDING BELOW

This matter was originally filed on behalf of the plaintiffs, Adda Motto, Marie Carey, David Carey, Kristi Carey and Sharon Runyon against CSX Transportation, Inc., (hereinafter "CSX"), and the West Virginia Department of Environmental Protection, Office of Abandoned Mine Lands, and Reclamation, (hereinafter "DEP") in Logan County Circuit Court. The DEP moved to have this matter transferred to Kanawha County Circuit Court where it was assigned to Judge Kaufman. The DEP subsequently moved to dismiss the matter for failing to comply with the notice provision set forth in West Virginia Code §55-17-3. Judge Kaufman certified the question by Order dated May 17, 2006.

STATEMENT OF FACTS

On or about June 15, 2005, Plaintiffs Adda Motto, Marie Carey, David Carey, Kristi Carey and Sharon Runyon (collectively referred to herein as "Plaintiffs") filed their Complaint in the Circuit Court of Logan County, West Virginia, alleging damages resulting from flooding that purportedly occurred on June 16, 2003. As indicated above, this matter was ultimately transferred to Kanawha County Circuit Court. This action arises as a result of a flood which occurred at Godby Branch. The plaintiffs' suffered substantial losses including the loss of their homes as well as most of their personal effects. Plaintiffs' allege that a culvert which was maintained by CSX was in poor condition and significantly blocked by debris due to lack of maintenance by CSX. In addition, plaintiffs' counsel learned in June of 2005 that the DEP may have some involvement because of mine flooding which occurred at the same time. At issue in the present appeal is whether plaintiffs failure to comply with the notice provisions of West Virginia Code §55-17-3 warrant dismissal of their action. The plaintiffs requested a stay in the

proceedings in Circuit Court below, of thirty (30) days to allow time to comply with the notice provision. Judge Kaufman after hearing argument found that a thirty (30) day stay to achieve the notice requirement was appropriate. He then certified the question to this honorable court.

DISCUSSION OF LAW

A. Imposition of a Thirty Day Stay in the Litigation File Would Serve to Meet the Requirements of the Notice Provisions of Section 55-17-3 While Preserving the Plaintiffs' Rights to File Their Lawsuits in Accordance with the Two Year Statute of Limitations.

Defendant's have alleged that WV Code §55-17-1, et. seq. is applicable to the facts of this case. WV Code §55-17-3 reads in part as follows, "at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the attorney general written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired." WV Code §55-17-2 defines certain terms contained in the act. "Judgment" is defined as follows:

- (3) "Judgment" means a judgment, order or decree of a court which would:
- (A) Require or otherwise mandate an expansion of, increase in, or addition to the services, duties or responsibilities of a government agency; (B) **Require or otherwise mandate an increase in the expenditures of a government agency above the level of expenditures approved or authorized before the entry of the proposed judgment; emphasis added** (C) Require or otherwise mandate the employment or other hiring of, or the contracting with, personnel or other entities by a government agency in addition to the personnel or other entities employed or otherwise hired by, or contracted with or by the

government agency; (D) Require or otherwise mandate payment of a claim based upon a breach of contract by a government agency; or (E) Declare an act of the Legislature unconstitutional and, therefore, unenforceable.

The purpose of the notice referenced above as set forth in WV Code §55-17-1, appears to be financially motivated to insure that the legislature can prepare for claims against the State that may have budget consequences.

Since the judgment sought in this case is for insurance benefits, it does not meet the definition of "judgment" as defined above. For example, the recovery in this case would not increase the level of expenditures, if, as plaintiff alleges, the negligent acts complained of are covered by a policy of insurance. The premium for this policy of insurance is already contained within the budget. Any judgment recovered will come from insurance assets, and not a legislative allocation of State funds. Accordingly, WV Code §55-17-1, et. seq. is not applicable to the case at bar.

In addition, this court has addressed the statute requiring a notice provision before filing a lawsuit in medical malpractice actions. With regard to the thirty (30) day notice provision in malpractice claims, this Court ruled that the notice provision should be liberally construed to promote the ends of justice. In Hinchman v. Gillette, 217 W.Va 378, 618 SE2d 387 (WV 2005). In addition, the Court is referred to Roy v. D'Amato, WL 842880 (W.Va) in a decision which was decided March 31, 2006, the Court in both cases clearly stated that the requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens access to the Courts. Furthermore, it would appear that the legislature has anticipated the affect of article 17 on the statute of limitations. Specifically, in Section 55-17-5, the following

language is set forth:

- (a) It is the express intent of the Legislature that the provisions of this article be liberally construed to effectuate the public policy set forth in section one of this article.

It is the plaintiffs' position that the statutory provisions of Chapter 55 of the West Virginia Code can be satisfied while preserving the plaintiffs' two year statute of limitations with the relief requested by the plaintiffs. That is to say, that both needs are addressed by simply staying this matter for thirty (30) days to allow the DEP the notice to which it is entitled, while preserving the plaintiffs' statutory limitations period.

Plaintiffs are aware of the recent per curiam decision rendered by this Court in State of W.Va. Ex rel. W. Va. Reg'l Jail Auth. v. Henning, No. 33059 (W. Va. Filed June 14, 2006) (per curiam order). However, the arguments raised above were not addressed in the Order handed down. Therefore, plaintiffs' request that they be heard on the issues as framed above, and the propriety of the saving statute argument raised by the DEP as more fully discussed below.

B. The Savings Statute Would Operate To Extend The Statute of Limitations For One-Year If This Case Were Dismissed Involuntarily and Without Prejudice By The Circuit Court.

If the Court were to conclude that the notification requirement set forth in W.Va. Code § 55-17-3, cannot be discretionarily waived by the Circuit Court and that the Circuit Court does not have the authority to stay the proceedings for thirty days to allow time to comply with the statutory provision, a dismissal under this rule would merely result in the Plaintiffs refiling their

claims under W.Va. Code § 55-2-18. The “savings statute,” as it is customarily called, operates to extend the statute of limitations for one-year for all cases involuntarily dismissed without prejudice. *W.Va. Code § 55-2-18*.

Specifically, West Virginia Code § 55-2-18 states:

- (a) For a period of one year from the date of an order dismissing an action or reversing a judgment, a party may refile the action if the initial pleading was timely filed and: (i) the action was involuntarily dismissed for any reason not based upon the merits of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.
- (b) For purposes of subsection (a) of this section, a dismissal not based upon the merits of the action includes, but is not limited to:
 - (1) A dismissal for failure to post an appropriate bond;
 - (2) A dismissal for loss or destruction of records in a former action; or
 - (3) A dismissal for failure to have process timely served, whether or not the party is notified by the Court of the pending dismissal.

Id.

The *West Virginia Rules of Civil Procedure* provide that where a civil action is *voluntarily* dismissed, the dismissal is without prejudice unless otherwise specified in the dismissal order. *W.Va. R. Civ. P.41 (a)(2)*. However, the WVRCP is silent as to actions which are *involuntarily* dismissed by way of a defendant’s motion against a plaintiff for failure to comply with statutory pre-filing notice requirements. Likewise, W.Va. Code, § 55-17-3, provides no guidance as to whether a dismissal for failure to comply with its statutory provisions

should be made with or without prejudice. Therefore, it is within the discretion of the Circuit Court to decide whether the case should be dismissed with or without prejudice. And, where a dismissal is *without* prejudice, our savings statute, W.Va. Code § 55-2-18, may be utilized to permit the re-filing of the action if it were involuntarily dismissed for failure to comply with the mandates of W.Va. Code § 55-17-3, because such dismissal would not be a dismissal on the merits.

Further, the case at hand was filed in a timely manner. On June 15, 2005, this civil action was filed in the Circuit Court of Logan County and designated as Civil Action No. 05-C-202. The Plaintiffs have alleged that they sustained damage to their property as a result of flooding which occurred in the Godby Branch Road area in Logan County, West Virginia, on June 16, 2003. To date, the Defendant has not raised an issue concerning the applicable statute of limitation in the Court below. In fact, in its brief regarding the review of certified questions to this Court, the defendant concedes that the plaintiffs' complaint was timely filed in stating that the complaint was filed "a day before the two-year statute of limitations expired."¹ *See Page 2 of the Brief of the West Virginia Department of Environmental Protection, Office of Abandoned Mine Lands And Reclamation Regarding Review of Certified Questions.*

Therefore, because the initial cause of action was timely filed, W.Va. Code § 55-2-18, permits the refiling of such action if dismissed involuntarily.

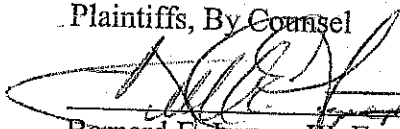
¹Although it is not germane to these proceedings, the Plaintiff asserts that the applicable statute of limitation as to the West Virginia Department of Environmental Protection did not begin to run until June 6, 2005, when co-counsel Letisha R. Bika, discovered through a letter she received from Michael Richardson, Emergency Program Manager, which outlined, at least in part, that a portion of the flooding was "mining related." *See Letter of Michael Richardson, June 6, 2005, Attached Hereto as Exhibit 1.*

RELIEF PRAYED FOR

In summary, the requirements of the statute can be met by allowing a stay in the action of thirty (30) days to permit the plaintiffs to give statutory notice to the State of West Virginia. Furthermore, it is the plaintiffs' position that the interests of justice would be promoted for all parties by granting the relief requested. Finally, in light of the nature of this appeal, it is untimely and procedurally inappropriate to address the saving statute as it may apply to this action. However, should the Court be so inclined, plaintiffs' request that they be allowed to refile pursuant to West Virginia Code §55-2-18 as discussed in Henning Supra.

Respectfully submitted,

Plaintiffs, By Counsel


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west virginia department of environmental protection

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Charleston, WV 25304
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Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

June 6, 2005

Ms. Letisha R. Bika, B.S., J.D.
Bika Law Office
114 Monongalia Street
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Dear Ms. Bika:

RE: Carey/Motto Flooding Complaints

On June 3, 2005, our office received your letter addressed to Mr. Mark Snyder concerning the flood damage at the Carey/Motto residences located in the Godby Branch area of Chapmanville, West Virginia.

During June 2003, this area received a tremendous amount of rainfall that resulted in flooding in the Chapmanville area. The Department of Environmental Protection staff performed many investigations into flood damage. Of these investigations, the only one that was deemed to be mining related was the Porter residence located in Godby Branch. Basically, drainage from a flooded deep mine carried debris down a hollow located behind the home and deposited it in their yard area. This also allowed mine drainage to flow around and under the Porter home. This was the only abandoned mine impacted property located and addressed in the Godby Branch watershed and may be the individual that you reference in your correspondence.

Public Law 95-87 of the Surface Mining Control and Reclamation Act of 1977 does allow for assistance to persons directly impacted by abandoned mines. However, this law only allows for land reclamation to address the abandoned mine related problem. It does not allow for property damage reimbursement. At the Porter site, we performed only the "on-ground" abatement work that was directly the result of the mining related problem. Our program did not provide any monetary relief to the occupants. Personal property damages are normally the responsibility of their homeowner's insurance carrier or FEMA.

You state in your letter that our office has denied that Mrs. Carey and Mrs. Motto received damage from an abandoned mine. Our records kept in the Abandoned Mine Lands Office do not indicate that they ever requested an investigation by our staff. However, many different staff members from several different state and federal offices were in the area during this time and they may have spoken to them. I am aware that several homes were flooded due to the blockage

Promoting a healthy environment.



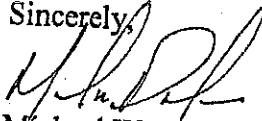
Ms. Letisha R. Bika

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of a railroad culvert located near the mouth of Godby Branch. If your client's homes were impacted in this manner, it is likely that they were directed to contact the railroad or FEMA.

We regret that our office is not able to provide any assistance in the matter; however, we must operate in the manner dictated by the federal and state guidelines that govern this program. Please feel free to contact me at 304.926.0499 ext. 1475 should you have any further questions regarding this issue or the Abandoned Mine Lands program in general.

Sincerely,



Michael W. Richardson
Emergency Program Manager

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADDA MOTTO, MARIE CAREY,
DAVID CAREY, KRISTI CAREY,
and SHARON RUNYON,

Plaintiffs,

v.

Case No. 33205

CSX TRANSPORTATION, INC.,
and WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
OFFICE OF ABANDONED MINE LANDS,
AND RECLAMATION, a West Virginia government entity,

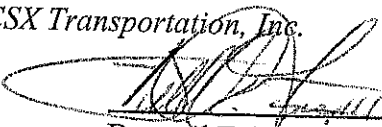
Defendants.

CERTIFICATE OF SERVICE

I, Bernard E. Layne, III, counsel for plaintiffs, do hereby certify that on this 6th day of December, 2006, I served **PLAINTIFFS' REPLY TO DEFENDANT'S BRIEF** upon counsel of record herein by depositing such in the U.S. Mail, first class, and addressed as follows:

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